

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1431

To be argued by
ABRAHAM SOLOMON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

-against-

WILLIAM ALGARIN

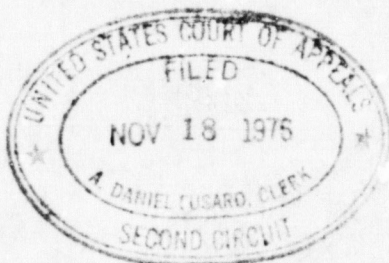
Defendant-Appellant

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Docket No. 76-1431

BRIEF FOR APPELLANT WILLIAM ALGARIN

Appeal From A Judgment Of
Conviction REnDered In The
United States District Court For
The Southern District of New York



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA :

Plaintiff-Appellee :

-against- :

Docket No. 76-1431

WILLIAM ALGARIN :

Defendant-Appellant :

-----X

BRIEF FOR APPELLANT

QUESTION PRESENTED

1. The Government failed to prove appellant's guilt beyond a reasonable doubt, and therefore it was error to deny his motion to acquit.

Preliminary Statement

This appeal is from a judgment the United States District Court for the Southern District of New York, (The Honorable Milton Pollack presiding) entered on July 22, 1976, convicting him after trial before a jury, on Count 5 which charged "On or about the 28th day of April, 1976, in the Southern District of New York, Gerardo Medina Martinez, a/k/a "Junior", Pedro Vazquez,

William Algarin, and Jose Colon Rodriguez, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I Narcotic drug controlled substance, to wit, approximately four and one-half ounces of heroin.

Title 21 United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.

The defendant was sentenced as a Youth Offender on count 5 pursuant to Section 5010(a) of Title 18, United States Code. Imposition of sentence is suspended. Defendant is placed on probation for a period of Three (3) years, subject to the standing probation order of this Court.

Statement of Facts

The witnesses who testified for the government (1) Detective Howard Dalton Balmer, Angel Rodriguez, William Petraglia, William Kilgallen and Detective Donald Kloppe.

Detective Balmer testified: He is a detective in the New York Police Department and was assigned to the New York Drug Enforcement Task Force. S.M. P.19 * On February 20, 1976 he received about \$1800 in official government funds. S.M. 21 and was

*All numerals refer to minutes of trial.

introduced by a confidential government informer to the co-defendant Martinez. S.M. 22-25.

They went to an apartment at 347 East 10th Street and there Balmer received two (2) plastic bags for which he paid Martinez \$1800. S.M. 30-31

On February 26, 1976 he met Detective Petraglia and received from him \$3,600. (S.M. 32-33) Later that evening Balmer returned to the aforesaid apartment; met Martinez who weighed two (2) plastic bags on a hand scale; each bag weighed an ounce. (37) Balmer received the packages and Martinez took the money. (42)

On March 12, 1976 he met Detective Petraglia and received from him \$3500 (51) and went to the Straus Store on 14th Street and Avenue C, where he met Martinez and they discussed a purchase of 2 ounces of Cocaine and then drove to 60 Columbia Street (55-58) where they entered an apartment-Martinez removed three (3) plastic envelopes, from a jewelry box. Each weighed half an ounce, gave them to Balmer and Martinez received \$2400. (63-64) On April 28, 1976 Balmer met Petraglia and received \$12,000 from him. (67)

At about 2:30 P.M. Balmer was on Avenue B between 10th and 11th Streets, met Martinez who then introduced him to Mr. Algarin. (72)

At about 3:30 Balmer again met Martinez; Algarin was also there. Martinez told him everything was going to be Okay. Martinez did all the talking (73-74) Wright gave him the money. (75) Balmer and Martinez went into a hallway and began to count the money. Having some difficulty they left and went into the Club. (76-77) Vasquez was also there at this time (78). Later at about 4:20 P.M. Balmer saw Martinez and Algarin. He gave Martinez a high sign; they met and had a conversation. He also saw Rodriquez in the vicinity.

Martinez and Balmer entered the social club and then met Rodriquez and an unknown man. (80-82) This unknown man gave Balmer a plastic bag containing heroin. Rodriquez and Martinez were also there at this time. (83)

Balmer left, went to the car, opened the trunk- at this time the surveilling officers came to the car and they were all placed under arrest. (81-85)

On cross-examination by Mr. Solomon the following occurred:

Q In all your transactions to which you testified here yesterday and this morning on cross-examination, did you ever speak to the defendant Algarin.

A I acknowledged the introduction that was made by Mr. Martinez to Mr. Algarin and he acknowledged me.

Q That that's all.

A That's it. (124)

Q You never discussed narcotics with him?

A No, I did not. (125)

Detective William Petraglia of the New York City Police Department was employed for 13 years and at that time was assigned to perform investigations (135).

On February 20, 1976 he met Detective Balmer and gave him \$1800. He then observed Balmer make a phone call; meet a female and a male; they all walked south on Avenue B. (141)

On March 12th he met Balmer and gave him \$3500. Later he observed Balmer and Martinez walk toward 60 Columbia Street but did not see where they went. (144)

Donald Klopper testified that on April 28, 1976 he observed Martinez and Algarin walk towards the River Bend Club; Martinez entered the club-Algarin remained outside (156). Later Martinez and Algarin met with Rodriguez. They had a conversation and then parted. (158)

William Kilgallen is employed in the New York City Police Department for 12 years; he was assigned to the United States Department of Justice Drug Enforcement Task Force for five (5) years.

On April 28, 1976 he was in the vicinity of Avenue B between East 10th and East 11th Street. He saw Martinez join Detective Balmer. (173-174) At 2:30 P.M. he saw Detective Balmer meet with Mr. Martinez and Algarin; they walked towards the government vehicle. Balmer entered same and the others left. (175) About 3:30 P.M. he again arrived in the vicinity and observed Martinez, Algarin and Vasquez in conversation. (176) Shortly thereafter Detective Balmer and Wright arrived by car. (177) Detective Balmer was joined by Vasquez, Martinez and Algarin. (177) Balmer went to the undercover vehicle, had a conversation with Wright and then Balmer rejoined Martinez, Vasquez and Algarin. (178) He then observed Wright go to the trunk of the vehicle-opened it- and then joined Balmer. Then they all met; Wright, Balmer, Algarin, Ploza and Vasquez. (178) Balmer and Martinez entered a building. Wright, Algarin and Vasquez stood in front of the doorway of this building. (178) Shortly thereafter Balmer and Martinez exited from the doorway and went to the other doorway and entered the social club; Wright accompanied them.

Algarin and Vasquez remained in front of that building 172 Avenue B. (180) He then observed Balmer-after he came out of the social club go to the car, open the trunk (183) and at this point, by a prearranged signal, Algarin was arrested. (184)

On April 29, 1976 while in the office of Harry Batchelder Assistant United States Attorney, the defendant Algarin was brought in and questioned. (It appears from the transcript that the defendant was fully advised of his Constitutional rights). (186-188) He was then questioned as follows:

By Mr. Batchelder; Assistant U.S. Attorney

Q What was the name and

A He stated his name was William Algarin Plaza.

Q Did Mr. Batchelder ask him his address.

A Yes.

Q What did he reply.

A 60 Columbia Street, apartment 13D. (189)

Detective Angel Rodriguez, recalled by the Government, testified as follows:

Following the arrest of the defendants Martinez, Algarin and Rodriguez they were put in a car and he heard the following conversation between Algarin and Martinez.

Algarin said "I hope they don't find the keys."

Rodriguez said "I told you the black guy was a shrimp. (275)

ARGUMENT

POINT I

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE CONVICTION AS SET FORTH IN COUNT FIVE (5) OF INTENTIONALLY AND KNOWINGLY DISTRIBUTING AND POSSESSING WITH INTENT TO DISTRIBUTE A SCHEDULE I NARCOTIC DRUG CONTROLLED SUBSTANCE.

At the close of the government's case and at the end of the entire case trial counsel for appellant Algarin, moved for a judgment of acquittal on the ground the evidence did not support a conviction.

The evidence arguably related to the appellant Algarin, viewed in the light most favorable to the Government, established the following facts:

Martinez and Balmer drove to 60 Columbia Street and entered an apartment. (55-58) On April 28, 1976 Balmer met Martinez and he was introduced to the appellant Algarin. (72) Later that afternoon Balmer again met Martinez and Algarin and talked to Martinez and was told everything was okay. That his conversation was with Martinez. (74) Martinez and Balmer entered the hallway. (76) Martinez said to Algarin and Vasquez "Cover the entrance." (74) Balmer never discussed narcotics with Mr. Algarin (the appellant). (124-125)

On March 12, 1976 Detective Pacraglia observed Balmer and Martinez go and enter 60 Columbia Street. (144)

On April 28, 1976 Kloppe testified he observed Martinez and Algarin walk to the River Bend Club. Later they met with Rodriguez. (158)

On April 28, 1976 Detective Kilgallen observed Palmer leave a vehicle and meet with Mr. Martinez and Mr. Algarin. (176) Later that day he saw Martinez, Vasquez and Algarin standing together in conversation. (176) Later he saw Detective Balmer and Martinez enter 170 Avenue B. Detective Wright, Mr. Algarin, and Mr. Vasquez standing in front of the doorway of said building. (179-180)

Shortly thereafter, Balmer and Martinez exited from this building and entered the social club, while Algarin and Vasquez remained outside. (180)

On April 29, 1976 Detective Kilgallen was in the office of the Assistant United States Attorney Batchelder and he heard the defendant Algarin state that his full name was Algarin Plaza (188) and this address was 60 Columbia Street. (189)

POINT II

THE GOVERNMENT FAILED TO PROVE
APPELLANT'S GUILT BEYOND A
REASONABLE DOUBT, AND THEREFORE
IT WAS ERROR TO DENY THE MOTION
TO ACQUIT.

The evidence fails to support a conviction under Title 18
United States Code, Section 2(a)

"Whoever commits an offense against the
United States, or aids, abets, counsels,
command, induces or procures its commission,
is a principal."

All of the testimony offered by the government against the
defendant Algarin, establishes only one element, to wit, that he
was in the company of one or more of the other defendants. It
fails to establish knowledge of what they were up to or aiding
and abetting them.

"Knowledge that a crime is being committed,
even when coupled with presence at the
crime, without more, however, is generally
insufficient to prove aiding and abetting."

United States v Garguilo 310 F(2)
249-253 2nd Circuit 1962.

At no point in the testimony is there any proof as to the defendant's
knowledge that the other defendants were engaged in a violation
of the narcotic laws. There must be proof, that the defendant
Algarin had guilty knowledge while present at the scene to aid and
abet or abet in the commission of the crime charged.

In United States v. Peoni, 100 F(2) 401-402 (2nd Circuit 1938) quoting in part, the Court said. "L. Hand J.)

"In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

United States v. Fantuzzi, 463 F(2) 683-690
(2nd Circuit 1974.)

United States v. Cianchetti, 315 F(2) 584-588
(2nd Circuit 1963)

Nye & Nisseu Corp. v. United States, 336 US 613-619
(1949) quoting in part refers to U.S. v. Peoni.

At the very least, "there must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or make it succeed."

United States v. Cirillo, 449 F(2) 872-883 2nd Circuit

United States v. Johnson, 513 F(2) 819-823, 2nd Circuit

United States v. Amato, 495 F(2) 545-550 1st Circuit

United States v. Gallishaw, 428 F(2) 760 2nd Circuit

United States v. Oliva, 497 F(2) 130 (5th Circuit.

The entire record is void of any proof that Appellant Algarin knew that his codefendants were engaged in any sale of heroin or in its distribution in violation of the law; and as charged in Count 5.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THE JUDGMENT OF THE DISTRICT COURT MUST BE REVERSED AND THE CASE REMANDED TO THE UNITED STATES DISTRICT COURT WITH INSTRUCTIONS TO GRANT THE MOTION OF ACQUITTAL MADE ON BEHALF OF THE DEFENDANT ALGARIN HEREIN AND TO ENTER A JUDGMENT ACCORDINGLY.

Dated: New York, New York
November 15, 1976

Respectfully submitted,

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